### United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

### Advice Memorandum

DATE: March 11, 2010

TO : Robert W. Chester, Regional Director

Region 6

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Omni William Penn Hotel 177-3987

Case 6-CA-36516 316-3390 339-2531 339-7537

347-4030-5000 385-2525-7500 530-4090-4000 530-6033-4270

This case, which arises from the dispute between UNITE HERE and Workers United, was submitted for advice to determine whether the Employer violated Section 8(a)(5) by refusing to recognize and bargain with UNITE HERE Local 57 as the Section 9(a) representative of the Employer's bargaining unit employees, and by refusing to remit dues to that union.

We agree with the Region that the charge should be dismissed, absent withdrawal. First, during the affiliation period of 2005-2009, the Pennsylvania Joint Board ("PAJB") displaced Local 57 as the unit employees' exclusive bargaining representative. Although it was improper for Local 57, as the original Section 9(a) representative, to delegate its responsibilities to the PAJB, no party challenged the PAJB's status within the Section 10(b) period. Moreover, neither the PAJB's disaffiliation from UNITE HERE nor Local 57's subsequent disaffiliation from the PAJB generates a question concerning representation because there is substantial continuity between the pre- and post-disaffiliation PAJB. Thus, the PAJB remains the bargaining representative in this unit and the Employer did not have an obligation to recognize and bargain with Local 57 or to remit dues to that union.

#### **FACTS**

#### A. Background

For many years prior to 2004, HERE Local 57 was the exclusive bargaining representative of about 200 employees at the Omni William Penn Hotel ("Employer") in downtown Pittsburgh. Local 57 maintained its own offices and had its own full-time officers and business agents, who handled all of Local 57's functions. They negotiated and administered contracts, processed and arbitrated grievances, and operated a hall that supplied extra staff as needed to hotels, including the Employer. Local 57 and the Employer were party to a collective-bargaining agreement effective October 1, 2002 to September 30, 2007.

In July 2004, the UNITE and HERE international unions merged to form UNITE HERE. Local 57 became known as UNITE HERE Local 57 but this did not change the manner in which Local 57 functioned.

#### B. Affiliation

About November 29, 2005, Local 57 affiliated with the Pennsylvania Joint Board ("PAJB"), which had been part of the prior UNITE organizational structure.<sup>2</sup> Section 1 of the affiliation agreement states that the PAJB's constitution shall prevail over Local 57's bylaws in the event of a conflict.<sup>3</sup> Section 8 of the affiliation agreement provides

 $<sup>^{1}</sup>$  Local 57 also represented the employees of other employers in the Pittsburgh region.

<sup>&</sup>lt;sup>2</sup> Before the merger, HERE's organizational structure consisted of the international union and local unions. UNITE's organizational structure consisted of an international union, joint boards, and local unions. The three-level structure utilized by UNITE prior to the merger continued after the merger, when many former HERE locals affiliated with joint boards.

<sup>&</sup>lt;sup>3</sup> It also states that the affiliation agreement shall prevail in the event of a conflict with the PAJB's constitution and that UNITE HERE's constitution shall

that Local 57's assets would become PAJB assets and that the PAJB would assume Local 57's liabilities. Under Section 9, Local 57's employees - including officers would fall under the supervision of the PAJB manager and become PAJB employees. Section 4(a) states that the affiliation was intended to "maintain continuity of representation," and that the current bargaining representative shall remain so "for at least the terms of all extant contracts...." Section 4(b) states that it shall "remain the responsibility and the prerogative of Local 57's officers and stewards" to administer agreements, with the assistance of PAJB representatives where appropriate, and that decisions with respect to contract administration and negotiation "shall be made as before, to the extent consistent with the [PAJB's] Constitution and practice."

As noted above, under the affiliation agreement the PAJB's constitution superseded any language in Local 57's bylaws. Article 4, Section 3 of the PAJB's constitution states, in relevant part, that "[a]ll collective bargaining agreements between the [PAJB] and any of its affiliated local unions and employers shall be executed by the [PAJB] Manager" or the PAJB Manager's designated representative. Similarly, Article 9, Section 3 grants the PAJB Manager the "power to negotiate, sign, and administer collective bargaining agreements with employers." Article 4, Section 4 of the PAJB's constitution states that the power to call, supervise, and terminate strikes by members of affiliated locals shall be "vested exclusively" in the PAJB Manager or the PAJB Manager's designated representative. Article 13, Sections 1 and 2, requires all dues to be paid to and collected by the PAJB, and grants the PAJB the power to fix the initiation fees and dues of local members subject to UNITE HERE approval. 4 Article 4, Section 5 states that the PAJB shall not be liable under any contract, including collective-bargaining agreements, for the conduct of an affiliated local unless the PAJB authorized the conduct.

prevail in the event of a conflict with the affiliation agreement.

 $<sup>^4</sup>$  The provision also permits affiliated locals to fix dues and fees subject to PAJB approval.

The UNITE HERE constitution states that a local union shall negotiate and enter into collective-bargaining agreements, enforce those agreements, and process grievances "except to the extent that UNITE HERE, or an affiliate of which the local is a part, is charged with any such responsibilities." It also states that "Joint boards shall organize, coordinate and supervise the activities of their affiliated local unions."

The affiliation drastically changed the way that Local 57 functioned. Thus, Local 57 no longer had assets, liabilities, or employees. The PAJB established an office in downtown Pittsburgh, but Local 57 did not share office space or staff with the PAJB, and the Local officers did not have office hours, e-mail addresses, or phone numbers. Local 57 president Edward Nassan and vice president Darrel Brown became full-time paid employees of the PAJB. In early 2006, Nassan's duties were extended beyond Local 57, and he was involved in a reorganization between the PAJB and the Mid-Atlantic Joint Board. After the affiliation, all of the representational functions formerly performed by Local 57 officers and staff were now performed by Joint Board officials and staff, as described in more detail below.

In January 2006, PAJB staff discovered that funds had been embezzled from Local 57. In April 2006, UNITE HERE placed Local 57 under trusteeship. PAJB Manager David Melman was named trustee, and PAJB Western District Director Sam Williamson was named deputy trustee. The Local 57 bylaws were suspended, and Nassan and Brown left their positions as PAJB employees. Toward the end of the trusteeship, on April 12, 2007, Local 57 members elected new officers and executive board members. The winning slate included Crescenzo "Chris" Petrilli as president, Dan Furlong as vice president, Devon Jennings as recording secretary, and six at-large executive board members. The new officers and executive board members were full-time hotel and/or food service employees, some of whom also

<sup>&</sup>lt;sup>5</sup> UNITE HERE constitution, Article 5, Section 3(a).

<sup>&</sup>lt;sup>6</sup> UNITE HERE constitution, Article 6, Section 1.

<sup>&</sup>lt;sup>7</sup> Neither was charged with embezzlement.

served as stewards in their respective shops. The trusteeship ended on April 30, 2007.

Around the time that the trusteeship ended, the PAJB staff drafted new Local 57 bylaws without any input from the Local 57 officers. Section 1 of the new bylaws state that Local 57's supreme governing body shall be its membership, whose decisions shall be final "unless contrary to a decision by the [PAJB]..." Under the new bylaws, the Local 57 president's only authority is to preside over Local 57 meetings and enforce the bylaws and the PAJB and UNITE HERE constitutions. The new bylaws also state that the UNITE HERE and PAJB constitutions control in the event of a conflict.

As mentioned above, the collective-bargaining agreement that was in place when Local 57 affiliated with the PAJB expired on September 30, 2007. The successor agreement was negotiated by PAJB Western District Director Williamson, with assistance from PAJB Manager Melman and PAJB Business Agent Roberts. Although the negotiating committee included shop stewards and other employees selected by the shop steward and/or the PAJB business agent, no individuals participated in bargaining in their capacity as Local 57 officers. Indeed, Williamson denied Local 57 President Petrilli's request to attend contract negotiations with another employer, the Renaissance Pittsburgh Hotel, and Petrilli acquiesced. The agreement was executed on March 25, 2008, and is effective from October 1, 2007 to September 30, 2011.9 It lists "UNITE HERE, PA JOINT BOARD LOCAL NO. 57" as the Union party on the cover page, the first page, and the signature page. PAJB staff, rather than Local 57 officers, conducted the ratification vote.

<sup>8</sup> The prior bylaws had given the Local 57 president collective bargaining authority.

 $<sup>^{9}</sup>$  Contracts with other employers were also negotiated by PAJB representatives.

After the affiliation, grievances were handled by the shop steward or the PAJB business agent. Local 57 officers played no role in handling grievances in their capacity as Local 57 officers, though some participated as shop stewards. Beginning in about January 2008, a grievance review committee was established to recommend which pending grievances should be considered for arbitration, though the PAJB would make the final decision. The committee consisted of representatives from Local 57 and Local 141, and it reviewed grievances from multiple locals in western Pennsylvania. In 2008, the committee recommended three grievances for arbitration, but the PAJB only permitted two to go forward.

After the affiliation, the Employer remitted dues to the PAJB rather than Local 57. The PAJB paid all expenses incurred in representing Local 57, and did not segregate the dues and expenses attributable to Local 57 from those attributable to other affiliated locals. Although dues increases and changes to initiation fees were ultimately determined by UNITE HERE, PAJB Manager Melman obtained permission from UNITE HERE to reduce the scheduled dues increase for Local 57.

After the new Local 57 officers were elected in April 2007, the Local 57 Executive Board held nine meetings. Local 57 President Petrilli presided over these meetings per the Local 57 bylaws, but PAJB official Williamson called the meetings and conducted the meetings to present his agenda, which often included the status of contract negotiations with various employers. A typical topic presented by a Local 57 officer was the status of Labor Day parade preparations, handled by Local 57 Vice President Furlong.

After the affiliation, Local 57 held three general membership meetings, all of which were called and conducted by Williamson. At these meetings, the Local 57 recording

<sup>&</sup>lt;sup>10</sup> Article 25 of the Employer's 2007-2011 collective-bargaining agreement permits an "employee/Union or the Union" to present step 1 grievances; requires "the Union" to appeal the grievance to step 2; and permits either the "Employer or the Union" to appeal the grievance to arbitration.

secretary would read the minutes of the most recent Local 57 Executive Board meeting, but would not take minutes of the membership meetings. The specific topics of these meetings are not known.

Labor-related meetings at the shop level were called and conducted by PAJB Business Agent Roberts and/or Local 57 members from the shop who were elected or appointed by Roberts. Local 57 officers did not participate in such shop meetings by virtue of their officer status. Indeed, the PAJB denied the request of a Local 57 officer who asked to go on shop visits, and the officer acquiesced.

Most of the shop stewards were in place before Local 57 affiliated with the PAJB. If there was a steward vacancy, the other stewards or the PAJB business agent would try to fill it, and if two or more employees were interested, there would be an election conducted by the steward or the business agent. Local 57 officers played no role in the selection of stewards. The PAJB also provided training for the Local 57 shop stewards (and stewards from other affiliated locals) without input from the Local 57 officers.

After the affiliation, the PAJB engaged in organizing activities within Local 57's historic jurisdiction. These efforts were developed and implemented solely by the PAJB without any input or participation from the Local 57 officers.

Both before and during the affiliation period, Local 57 Vice President Furlong was in charge of Local 57's participation in the local Labor Day parade, and attended monthly parade committee meetings at the Allegheny County Labor Council. In 2008, Local 57 organized a large Labor Day party.

#### C. Disaffiliation

On February 6, 2009, the PAJB Executive Joint Board - which included Local 57 President Petrilli - voted unanimously to disaffiliate from UNITE HERE. Petrilli resigned from his position as Local 57 president after the vote, and Furlong became the Local 57 president.

On February 19, 2009, at the Local 57 Executive Board meeting, PAJB Manager Melman explained that the next step in disaffiliating from UNITE HERE would be votes in the local shops. According to the PAJB, the Local 57 Executive Board decided to conduct the votes during the week of March 7, 2009. Local 57, however, asserts that it did not agree to conduct votes to disaffiliate from UNITE HERE.

On February 25, 2009, the Local 57 Executive Board voted (with one member absent) unanimously to disaffiliate from PAJB and remain affiliated with UNITE HERE.

On about March 7, 2009, the PAJB delegates representing the constituent locals voted unanimously to disaffiliate from UNITE HERE. Nineteen delegates from Local 57, including one member of the Local 57 Executive Board, attended the meeting.

During the week of March 18, 2009, the PAJB conducted a vote among the Employer's employees. The PAJB then informed the Employer that 76 employees voted in favor of staying with the PAJB and leaving UNITE HERE, while 17 employees voted against it.

#### D. Post-disaffiliation

The PAJB has the same staff, property, and dues structure as before the disaffiliation. All the stewards at the Employer remain the same. All of the files and records relating to the Local 57 membership have remained with the PAJB. However, the PAJB no longer oversees the hall that provides extra bartenders to employers. Instead, the individual who ran the hall for the PAJB now operates it out of a building rented from another union. After the disaffiliation, Local 57's officers remain the same, but it has no central telephone. Instead, Local 57 operates through a committee of pro-UNITE HERE employees who each maintain contact with other employees. Also, UNITE HERE organizers from around the country have arrived to assist Local 57.

Both factions have sent letters to the Employer demanding recognition, dues payments, non-employee access, and participation in grievance processing. On April 14, 2009, the Employer announced that it would continue to fund

the employees' pension and health and welfare funds, but that it would place dues in an escrow account.

On June 12, 2009, a group of about 10 UNITE HERE supporters (about half of whom were employees) arrived at Employer General Manager Eric DeStefano's office to present petitions supporting UNITE HERE that appear to bear the signatures of 181 active bargaining unit employees. DeStefano was not present at the time, but the group was informed that DeStefano would not meet with them. An employee who claims to have been the spokesperson of the group states that, later in the day, DeStefano told him that the Employer had always worked with the PAJB, that its contract was with the PAJB, and that PAJB Business Agent Roberts was the only representative the Employer was authorized to deal with.

On June 19, 2009, a group of five UNITE HERE supporters arrived at DeStefano's office in an attempt to be heard as a committee regarding pending grievances. DeStefano was out of the office and the group was told that he would only meet employees individually.

On June 30, 2009, the Employer met with PAJB officials Williamson and Melman, who requested recognition and access based on continuity of representation, and also requested that the Employer consider a letter of indemnification regarding dues. The Employer attempted to arrange a similar meeting with Local 57 President Furlong and UNITE HERE organizer Mackenzie Smith, who had arrived from Boston after the disaffiliation. However, Furlong never responded, and Smith insisted that the Employer meet with a five-member committee rather than two representatives, which the Employer refused to do.

The Employer has placed employees' dues into an escrow account, but has continued payments to the contractual benefit funds. In addition, the Employer is processing grievances only at the shop steward level. 11 Also, the Employer has continued to deal with existing shop stewards, but has denied both factions' requests to designate

<sup>&</sup>lt;sup>11</sup> The Employer has suspended contractual time limits for processing grievances.

additional shop stewards.<sup>12</sup> The Employer has continued to grant access to employee areas to PAJB Business Agent Roberts because he had been servicing the unit for several years, but has denied UNITE HERE's access request for organizer Mackenzie Smith.

#### ACTION

We agree with the Region that the charge should be dismissed, absent withdrawal. First, during the affiliation period of 2005-2009, the PAJB displaced Local 57 as the unit employees' exclusive bargaining representative. Although it was improper for Local 57, as the original exclusive bargaining representative, to delegate its responsibilities to the PAJB, no party challenged the PAJB's status within the Section 10(b) period. Moreover, neither the PAJB's disaffiliation from UNITE HERE nor Local 57's subsequent disaffiliation from the PAJB generates a question concerning representation because there is substantial continuity between the preand post-disaffiliation PAJB. Thus, the PAJB remains the bargaining representative and the Employer did not have an obligation to recognize and bargain with Local 57 or to remit dues to that union.

# A. The PAJB became the unit employees' Section 9(a) representative during the 2005-2009 affiliation period.

An employer's obligation to bargain extends only to the statutory representative selected by a majority of the unit employees. 13 While the Section 9(a) representative may delegate some of its representational duties to an agent, it may not delegate its Section 9(a) responsibility. 14 The

 $<sup>^{12}</sup>$  It appears that two of the five shop stewards support the PAJB, two support Local 57, and one has not clearly declared an allegiance.

<sup>13</sup> See, e.g., <u>Medo Photo Supply Corp. v. NLRB</u>, 321 U.S. 678, 683-684 (1944); <u>Standard Oil Co.</u>, 92 NLRB 227, 236 (1950), remanded on other grounds 196 F.2d 892 (6th Cir. 1952).

<sup>14</sup> Compare Nevada Security Innovations, Ltd., 341 NLRB 953,
953 n.1, 953-56 (2004) (employer violated Section 8(a)(5)

Board has found an improper delegation of representation where there has been a wholesale substitution of another union for the designated Section 9(a) representative. 15

In determining whether a union has improperly delegated its Section 9(a) status to another union, rather than merely delegating certain representational duties to an agent, the Board examines both the content of any agreements between the two unions and the conduct of the original union in carrying out its Section 9(a) responsibilities. The Board considers such factors as the scope of functions and duties performed by the original union and its purported agent; the oversight retained by the original union; and actions or statements by the original union evidencing that it has relinquished its Section 9(a) role.

Thus, in <u>Goad Co.</u>, <sup>16</sup> Plumbers Local 420 improperly attempted to transfer its Section 9(a) status to Local 562 by executing a service agreement that delegated all representational functions to Local 562, required the unit's dues to be paid to Local 562 in exchange for its

by refusing to bargain with certified representative, the international, where the international had merely delegated some of its duties to its local) with <u>Goad Co.</u>, 333 NLRB 677, 677 n.1, 679-80 (2001) (where Section 9(a) representative improperly sought to transfer all its representational responsibilities to its sister local, the employer lawfully refused to bargain with the sister local).

15 <u>Id.</u> at 679-80 (agreement between Section 9(a) representative and its purported agent "stands the law of agency on its head" by absolving the principal for the actions of its own purported agent, and confirmed that the principal was "bowing out" of its representational duties); Sherwood Ford, Inc., 188 NLRB 131, 133-34 (1971) (resolution provided that Section 9(a) representative would carry out instructions of its purported agent, and "it was there that the switch became manifest, for the dog had now become the tail").

<sup>&</sup>lt;sup>16</sup> 333 NLRB at 679, 680.

services, and held Local 420 harmless for any breach of the duty of fair representation that could arise as a result of Local 562's actions. In addition, Local 420's business agent told the employer that he would not partake in negotiations and that Local 562's business agent was "the guy we're going to...."

The Board affirmed the ALJ's conclusion that the employer lawfully refused to bargain with Local 562 because Local 420 "did not simply enlist the aid of an agent, but transferred its representational responsibilities to Local 562."

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On the other hand, in <u>Nevada Security Innovations</u>, <u>Ltd.</u>, <sup>19</sup> the Board found no improper transfer of Section 9(a) status where a servicing agreement delegated some of the certified national union's representational duties to an affiliated local, but also stated that the national union would be "in charge of negotiations" and that the local was to keep the national informed of its activities. The Board also relied on a declaration from the national union's secretary-treasurer, stating that the national remained the "certified bargaining representative for the unit employees and has never delegated authority elsewhere," to evidence the national's "consistent willingness" to serve as the unit employees' Section 9(a) representative.<sup>20</sup>

In the instant case, the evidence shows that during the affiliation period of late 2005 to early 2009, Local 57 did not merely delegate some of its duties to the PAJB, but rather substituted the PAJB as the exclusive bargaining

 $<sup>^{17}</sup>$  Id. at 680.

<sup>18</sup> Id. at 677 n.1. See also Sherwood Ford, Inc., 188 NLRB at 134 (finding that Local 1 improperly delegated its Section 9(a) responsibilities to Local 604 via a resolution that designated Local 604 as the unit employees' bargaining representative, provided that Local 604 would receive dues according to its own dues schedule in exchange for providing services, and required Local 1's officers to carry out Local 604's instructions; also, employees signed Local 604 cards and began paying dues to Local 604).

<sup>&</sup>lt;sup>19</sup> 341 NLRB at 953 n.1, 954, 956.

<sup>&</sup>lt;sup>20</sup> Id. at 953 n.1, 955.

representative of the Employer's unit employees. In reaching this conclusion, we rely both on the terms of the relevant documents and the facts showing that during the affiliation period, the PAJB was the only entity performing representational functions and that Local 57 answered to the PAJB.

Initially, the terms of the affiliation agreement indicate that the PAJB was being substituted as the new Section 9(a) representative. The provision that the PAJB would take over all of Local 57's assets and employees made it impossible for Local 57 independently to carry out any representational responsibilities. The provision stating that the PAJB assumed all of Local 57's liabilities further indicates that Local 57 was completely "bowing out" rather than delegating some duties to an agent.<sup>21</sup>

Moreover, the PAJB's constitution reserves core representational functions for the PAJB, rather than its affiliated locals. For example, the PAJB's constitution requires all collective-bargaining agreements to be executed by the PAJB manager; gives the PAJB manager the power to negotiate, sign, and administer collective-bargaining agreements; and vests the PAJB manager with exclusive authority to call, supervise, and terminate strikes.<sup>22</sup> The PAJB's constitution also requires all dues to be paid to the PAJB, and grants the PAJB the ability to modify dues subject to the approval of UNITE HERE, whereas affiliated locals may only seek a dues modification from UNITE HERE if the PAJB acquiesces.<sup>23</sup> Together, these

<sup>&</sup>lt;sup>21</sup> Cf. <u>Goad Co.</u>, 333 NLRB at 679, 680 (indemnification clause in servicing agreement that required purported principal local to be held harmless for any breach of duty of fair representation caused by purported agent local showed purported principal local was "bowing out").

 $<sup>^{22}</sup>$  The Local 57 bylaws that were in effect when Local 57 affiliated with the PAJB were inconsistent in that they gave collective bargaining authority to the Local 57 president.

 $<sup>^{23}</sup>$  See <u>Goad Co.</u>, 333 NLRB at 680 (improper transfer of 9(a) status evidenced by fact unit employees' dues to be paid to

provisions indicate that Local 57 and the PAJB were agreeing that the latter would serve as the employees' exclusive bargaining representative. $^{24}$ 

This is not to say that the above provisions alone established the PAJB as the Section 9(a) representative. Indeed, Section 4(a) and 4(b) of the affiliation agreement arguably indicate that Local 57 would remain the Section 9(a) representative after the affiliation, and the PAJB's constitution purports to absolve the PAJB of liability for the unauthorized acts of its affiliated locals. However, the provision in Section 4(a) stating that the "current collective bargaining representative shall remain" in that role also contains language limiting the provision to the term of the extant contract, which expired in 2007. And, the provision in Section 4(b) stating that Local 57's officers shall retain the "responsibility and prerogative" to administer collective bargaining agreements with the PAJB's assistance also states that decisions regarding contract negotiation and administration must be consistent with the PAJB's constitution and practice. Finally, the PAJB constitution's hold-harmless provision would appear to be trumped by the assumption of liabilities provision in the affiliation agreement, which prevails in the event of a conflict. $^{25}$  In any event, as described below, the substantive reality is that Local 57 did not exercise whatever representational authority the affiliation agreement arguably left it.

new local in exchange for its services); Sherwood Ford, Inc., 188 NLRB at 134 (same).

<sup>&</sup>lt;sup>24</sup> Cf. <u>Nevada Security Innovations</u>, <u>Ltd.</u>, 341 NLRB at 953 n.1, 956 (certified national union did not transfer bargaining rights to local where, among other things, servicing agreement stated that national union would be in charge of negotiations).

<sup>25</sup> Although the UNITE HERE constitution states that local unions are to negotiate and administer collective-bargaining agreements, that provision is qualified by language stating "except to the extent that...an affiliate of which the local is a part," such as the PAJB, is charged with any such responsibilities.

During the affiliation period, the PAJB took over all representational functions for the bargaining unit. PAJB officials negotiated and executed the current collectivebargaining agreement and conducted the ratification vote. Local 57 held only three membership meetings, and those meetings were called and run by PAJB official Williamson, not by Local 57 officers. Williamson also ran and set the agenda for the Local 57 Executive Board meetings. 26 Above the shop steward level, PAJB officials handled all interactions with the Employer regarding grievance processing or other employee concerns, with no input or assistance from Local 57 officers. 27 PAJB staff planned and conducted all organizing activity in Local 57's historic jurisdiction without input or participation from Local 57 officers. The Employer remitted dues to the PAJB, and the PAJB secured from UNITE HERE a waiver of a planned dues increase for Local 57's members. Local 57 had no control over member dues; indeed, the PAJB commingled the dues from Local 57 members with the dues from members of other affiliated locals. Local 57 owned no property, had no employees, and had no access to membership files. Local 57 members alleged violations of the duty of fair representation, those allegations were defended by the PAJB, consistent with the affiliation agreement's requirement that the PAJB assume Local 57's liabilities. 28 When the trusteeship ended in May 2007, new Local 57 bylaws were drafted to be consistent with the PAJB's constitution without input or protest from the Local 57 officers. 29

 $<sup>^{26}</sup>$  The Local 57 president nominally presided over the executive board meetings.

 $<sup>^{27}</sup>$  Although Local 57 officers served on a grievance review committee with officers from another local, the committee's purview covered both locals, and the PAJB did not necessarily implement the committee's recommendations.

<sup>&</sup>lt;sup>28</sup> See <u>Goad Co.</u>, 333 NLRB at 679, 680.

<sup>&</sup>lt;sup>29</sup> We recognize that evidence from the one-year trusteeship, alone, would not indicate that Local 57 had transferred its bargaining status to the PAJB. However, the PAJB performed all of the representational functions for the unit during

The only functions performed by Local 57 officers, in that capacity, were formally presiding over Local 57 Executive Board meetings and recording the minutes. Those meetings were called and run by PAJB official Williamson. While Local 57 officers organized parades and picnics, these were internal social functions, not the kind of core representational functions that would indicate that Local 57 had retained Section 9(a) status after the affiliation.

The current contract's reference to the Union as "UNITE HERE, PA JOINT BOARD LOCAL NO. 57" does not establish Local 57's representative status. That wording does not change the fact that the PAJB exclusively negotiated, executed, and enforced the agreement. To the extent that some Local 57 officers participated in bargaining or grievance processing, it was only in their capacity as shop stewards. In addition, Local 57 officers had to ask PAJB officials for permission to attend bargaining sessions or visit shops and acquiesced when those requests were denied.

Recent Advice cases involving the dispute between UNITE HERE and Workers United are also instructive. Martin's Catering, 30 we concluded that Local 7 transferred its representational status to the Mid-Atlantic Regional Joint Board, with which it had affiliated. The affiliation agreement in Martin's Catering required Local 7 to transfer its assets, liabilities, and employees to the joint board. And, the joint board's constitution stated that all members of affiliated locals were deemed to have authorized the joint board to be their exclusive bargaining representative, that only the joint board could execute collective-bargaining agreements, and that dues must be remitted to the joint board. In addition, during the affiliation period, the Martin's Catering joint board took over Local 7's employees and property and exercised the representational functions previously performed by Local 7, which had no officers and held no meetings for a

the affiliation period, both before and after the trusteeship.

<sup>30</sup> Cases 5-CA-34912, et al., Advice Memorandum dated October 1, 2009.

significant portion of the affiliation period. These factors effectively negated provisions in the affiliation agreement that arguably indicated that Local 7 had retained its Section 9(a) status.

Here, as in Martin's Catering, the affiliation agreement and PAJB constitution transferred all of Local 57's assets, liabilities, employees, and representational responsibilities to the PAJB. The distinctions from Martin's Catering are not significant. Thus, although the language in the PAJB's constitution does not explicitly state that the PAJB is the Section 9(a) representative, it nonetheless indicates that the parties understood that the PAJB would be responsible for performing all of the core representational functions formerly performed by Local 57 officers and staff, i.e. negotiating and administering contracts, calling strikes, and receiving dues. And, although Local 57 had officers and held meetings during the affiliation period, the Local 57 officers performed primarily internal social functions.

[FOIA Exemption 5

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31 [FOIA Exemption 5

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 $<sup>^{32}</sup>$  See also Nevada Security Innovations, Ltd., 341 NLRB at 953 n.1 (no transfer of Section 9(a) status where, among other things, service agreement emphasized that original union would be in charge of negotiations on behalf of unit).

Based on all of the above, we cannot conclude that Local 57 remained the bargaining representative during the affiliation period and that the PAJB was merely acting as its agent. Rather, the evidence indicates that the PAJB became the Section 9(a) representative during the affiliation period. In reaching this conclusion, we find particularly relevant Local 57's failure to perform any representational functions during the affiliation period after having been the sole entity to perform such functions prior to the affiliation, as well as Local 57's lack of autonomy, e.g., when the PAJB denied the Local 57 officers' requests for permission to attend bargaining sessions and shop meetings. 33 Had the Employer timely challenged that transfer of representative status, under the principles set forth in Goad and Sherwood Ford, it would not have been obligated to deal with the PAJB as their employees' exclusive bargaining representative. However, the Employer did not challenge that transfer, and its voluntary recognition of the PAJB as its employees' Section 9(a) representative occurred well outside the current Section 10(b) period. 34 Even if an employer grants Section 9(a) recognition to a non-majority union, the Board will not entertain a challenge to that recognition made more than six months later. 35 Thus, by virtue of Local 57's transfer of representational responsibilities and duties to the PAJB, and the Employer's acquiescence in that transfer, we conclude that the PAJB became the bargaining representative

33 See <u>Sherwood Ford</u>, <u>Inc.</u>, 188 NLRB at 134 ("Under elementary principles of agency law...the principal controls the agent, not the reverse").

 $<sup>^{34}</sup>$  The charge was filed on June 26, 2009.

<sup>35</sup> See Machinists Local Lodge 1424 v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 416-417, 419 (1960) (finding employer's 8 (b) (1) (A) allegation time-barred under Section 10 (b) because entire basis for allegation was union's lack of majority status when original contract was signed outside 10 (b) period); Raymond F. Kravis Center for the Performing Arts, 351 NLRB 143, 144 & nn.8, 9 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008).

of the Employer's employees during the 2005-2009 affiliation period.

# B. The PAJB remains the Section 9(a) representative because there is substantial continuity between the pre- and post-disaffiliation PAJB.

An employer's obligation to recognize and bargain with the incumbent union following a change in affiliation continues "unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative." In determining whether there is "substantial continuity" in representation, the Board examines the "totality of the circumstances," and considers a number of factors, including the union officials' responsibilities, membership rights and duties, the dues/fees structure, governing documents, the manner in which contract negotiations and administration are handled, and the representative's assets. 38

Here, the changes resulting from the disaffiliations were not so dramatic as to alter the identity of the PAJB as the unit's bargaining representative. The disaffiliations did not result in any change to the continued leadership responsibilities of existing PAJB officials, as Melman, Williamson, and Roberts all remain in the same positions with the PAJB. Indeed, the PAJB has only lost the services of Local 57 officers who were not involved in contract negotiation, contract administration, or organizing. Also, there is no evidence of any change to membership rights and duties, the dues structure, or the PAJB's physical facilities, records, and assets. After the disaffiliation, the Employer has continued to deal with the

 $<sup>^{36}</sup>$  Raymond F. Kravis Center for the Performing Arts, 351 NLRB at 147.

 $<sup>\</sup>frac{37}{100}$  Mike Basil Chevrolet, 331 NLRB 1044, 1044 (2000) (amending certification to reflect change in affiliation).

<sup>38</sup> See Western Commercial Transport, 288 NLRB 214, 217 (1988) (dismissing petition to amend certification where affiliation effected "dramatic change" in the bargaining representative).

same shop stewards and PAJB Business Agent Roberts. The only change in the PAJB's representation of the unit, other than the Employer's escrow of dues and refusal to process grievances above the shop steward level, is that the PAJB no longer oversees the roll call for bartender extras. However, bartender extras are a relatively small portion of the bargaining unit, and the current collective-bargaining agreement appears to permit the Employer to hire such employees from any source of supply.

Accordingly, because the disaffiliation was not so dramatic as to alter the identity of the PAJB, it remains the collective-bargaining representative, and the Employer has no obligation to bargain with Local 57 or to remit dues to that union. The Region should therefore dismiss the Section 8(a)(5) refusal to bargain allegation, absent withdrawal.<sup>39</sup>

/s/ B.J.K.

 $^{39}$  Although we have determined that the PAJB is the Section 9(a) representative of the Employer's unit employees, we do not address whether the Employer violated the Act by failing to remit dues to the PAJB, because that issue is not before us. [FOIA Exemption 5